IN THE

SUPREME COURT

OF THE

UNITED STATES.

C. W. Smith, as Receiver of the Atlantic & Pacific Railroad Company,
Plaintiff in Error,

vs.

Truman Reeves, as Treasurer of the State of California,
Defendant in Error.

No. 242.

BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

In addition to the facts as stated by plaintiff in error, defendant in error adds the following:

The action was begun in the name of J. W. Reinhart, the former receiver of said road, and against J. R. McDonald, then the State Treasurer. To the said complaint a demurrer was interposed, upon the grounds, first, that the court had no jurisdiction of the subject-matter of the action, and, second, that the complaint failed to state facts sufficient to constitute a cause of action. The Circuit Court, McKenna, J., sustained the demurrer upon the second ground.

Plaintiff in error filed an amended complaint, containing a formal substitution of parties, the former defendant, McDonald, having gone out of office, and Levi Rackliffe succeeding him. To this amended complaint a demurrer was interposed upon the same grounds as heretofore. The Circuit Court, Morrow, J., again sustained the demurrer upon the second ground, and plaintiff in error declining to amend his complaint, his default was entered and judgment rendered for defendant in error, dismissing the action. Upon Writ of Error to the United States Circuit Court of Appeals, the defendant in error again raised the objection presented in the lower court, that the court was without jurisdiction of the subject-matter of

the action, upon the ground that it is an action against the State of California, and subject to the inhibition of the Eleventh Amendment to the Constitution of the United States, and likewise urged its second ground of demurrer, but the Circuit Court of Appeals, Gilbert, J., sustained the demurrer upon the first ground, viz: that the court did not have jurisdiction of the subject-matter of the action, and affirmed the judgment of the Circuit Court, dismissing the action. The present hearing is upon Writ of Error from this court, and again defendant in error presents the same grounds of demurrer as were presented to the courts below. In the meantime, however, Levi Rackliffe, the defendant in error, died, and W. S. Green was appointed as State Treasurer to fill the vacancy caused by said death and was substituted as defendant in error. Subsequently, and prior to the completion of the record in this court, W. S. Green was superseded in office by Truman Reeves, who assumed office January 1, 1899; Reeves was duly substituted as the defendant in error, and urges the objections as hereinabove stated.

POINTS, ARGUMENTS, AND AUTHORITIES.

FIRST POINT.

State of California the Real Party in Interest.

In is conceded that this action was brought under the authority of Section 3669 of the Political Code of California. (Plaintiff in Error, Brief, pp. 9–11.) That Section, in its entirety, as amended in 1891, and as it stood at the time the assessment for taxes complained of was made, is as follows:

"Each corporation, person or association, assessed by the State Board of Equalization, must pay to the State Treasurer, *upon the order of the Controller, as other moneys are required to be paid into the Treasury*, the State and county, and city and county, taxes each year levied upon the property so assessed to it or him by said Board. Any corporation, person or association, dissatisfied with the assessment made by the Board, upon the payment of the taxes due upon the assessment complained of, and the percentage added, if to be added, on or before the first Monday in June, *and the filing of notice with the Controller of an intention to begin an action*, may, not later than the first Monday in June, bring an action against the State Treasurer for the recovery of the amount of taxes and percentage so paid to the Treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the summons must be served upon the Treasurer within ten days after the complaint has been filed, and the Treasurer has thirty days within which to demur or answer. *At the time the Treasurer demurs or answers, he may demand that the action be tried in the Superior Court of the County of Sacramento.* The Attorney-General must defend the action. *The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for.* If the final judgment be against the Treasurer, upon presentation of a certified copy of such judgment to the Controller, *he shall draw his warrant upon the State Treasurer*, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected; *and the cost of such action, audited by the Board of Examiners, must be paid out of any money in the General Fund of the Treasury, which is hereby appropriated*, and the Controller may demand and receive from the county, or city and county, interested, the proportion of such costs, or may deduct such proportion from any money then or to become due to said county, or city and county. Such action must be begun on or before the first Monday in June of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action." (Statutes of 1891, page 442.)

The title of this action is "C. W. Smith, *as* Receiver of the Atlantic & Pacific Railroad Company," against "Truman Reeves, *as* Treasurer of the State of California."

The Treasurer of the State of California is simply the custodian of money belonging to the State. It is his duty, under the law, "to receive and keep in the vaults of the State Treasury all moneys belonging to the State not required to be received and kept by some other person."

Subd. 1 of Sec. 452, Political Code.

He can receive no money into the Treasury unless accompanied by a certificate of the Controller, showing by whom the payment is to be made, the amount thereof, and the funds into which it is to be paid.

Secs. 453 and 434, and Subd. 11 of Sec. 433 of the Political Code.

He can pay out no money except upon warrant drawn by the Controller.

Subd. 4 of Sec. 452, Political Code.

No warrant can be drawn by the Controller unless authorized by law.

Subd. 16 of Sec. 433, Political Code.

The money sued for in this action was, under the provisions of Section 3669, *supra*, paid "to the State Treasurer upon the order of the Controller, *as other moneys are required to be paid into the Treasury*," and as *all* other moneys, due for State and county, and city and county taxes, "assessed by the State Board of Equalization," are paid. The payment was to the State, as other State moneys, and moneys of a like character, are paid, not to the Treasurer. It came into the Treasury through the regular channels provided by law; *and it is now in the Treasury mingled with other moneys of the State*, and is, in no sense, money wrongfully or illegally in the possession of the Treasurer. It cannot be in any way segregated or distinguished from the other moneys of the State in his custody. And it could only leave his custody in the regular manner authorized by law for the payment by him of State moneys, viz: upon a warrant drawn by another State officer, the Controller, who is not a party to this action.

From all of this it is manifest, beyond peradventure, that the real party defendant to this action is the State of California, and that the Treasurer has no personal interest whatever in the controversy, but defends solely as the State's representative.

In the case of *Georgia* vs. *Madrazo*, 26 U. S. (1 Pet.) 110, Mr. Chief Justice Marshall, in discussing the question as to whether the State is a party where its Governor is sued in his representative capacity, says, at page 123:

"The case made, in both the libel and claim, exhibits *a demand for money actually in the Treasury of the State, mixed up with its general funds*, and for slaves in possession of the Government. It is not alleged, nor is it the fact, that this money had been brought into the Treasury, or these Africans into the possession of the Executive, by any violation of an Act of Congress. The possession has been acquired by means which it was lawful to employ. The claim upon the Governor is as a Governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially. The decree is

pronounced, not against the person, but the officer, and appears to have been pronounced against the successor of the original defendant, as the appeal bond was executed by a different Governor from him who filed the information. In such a case, where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record. If the State is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause, before a decree can be regularly pronounced.

"But were it to be admitted that the Governor could be considered as a defendant, in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the State made for the purpose of giving effect to any Act of Congress, and has done nothing in violation of any law of the United States. The decree is not to be considered as made in a case in which the Governor was defendant in his personal character; nor could a decree against him, in that character, be supported."

See also—

Kentucky vs. *Dennison*, 24 How. 66;

Louisiana vs. *Jumel*, 107 U. S. 711;

Hagood vs. *Southern*, 117 U. S. 52-67;

In re Ayers, 123 U. S. 443-448;

Louisiana vs. *Steele*, 134 U. S. 230-232;

North Carolina vs. *Temple*, 134 U. S. 22;

U. S. vs. *Beebe*, 127 U. S. 344;

Penmayer vs. *McConnaughy*, 140 U. S. 1-9;

Reagan vs. *Farmers' Loan & Trust Co.*, 154 U. S. 388;

Belknap vs. *Schield*, 161 U. S. 10-22.

From the foregoing authorities, it seems perfectly clear that where the record discloses the fact that the nominal defendants have no personal interest in the subject-matter of the suit, but defend only as representing the State, the State is the real party in interest and the party against whom the relief is sought.

As was said by Mr. Justice Mathews, in *In re Ayers*, page 492, *supra*:

"Whether it (State of Virginia) is the actual party, in the sense of the prohibition of the Constitution, must be determined by a consideration of the nature of the case as presented on the whole record."

But counsel for plaintiff in error cite the case of *Osborn* vs. *Bank of United States*, 9 Wheaton, 738, and *Davis* vs. *Gray*, 16 Wall. 203, and the cases following these cases, as enunciating a contrary doctrine. This case has received the careful attention of this court in a number of well-considered cases, and the distinction between the doctrine of the respective cases very clearly pointed out.

In the case of *Louisiana* vs. *Jumel*, 107 U. S. 711-724, after stating the point of decision in the *Osborn* case, the court say, at page 725:

"Thus the money seized was kept out of the treasury, because if it got in it would be irretrievably lost to the bank, since the State could not be sued to recover it back. No one pretended that if the money had been actually paid into the treasury, and had become mixed with the other money there, it could have been got back from the State by a suit against the officers. They would have been individually liable for the unlawful seizure and conversion, but the recovery would be against them individually for the wrongs they had personally done, and

could have no effect on the money which was held by the State. Certainly no one would ever suppose that by a proceeding against the officers alone, they could be held as trustees for the bank, and required to set apart from the moneys in the treasury an amount equal to that which had been improperly put there, and hold it for the discharge of the liability which the State incurred by reason of the unlawful exaction."

Again, in *Hagood* vs. *Southern*, 117 U. S. 52-69, where the officers of the State of South Carolina were sued, in their representative capacity, to enforce an obligation of the State, Mr. Justice Mathews says, at page 69:

"A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the State according to the dictates and decrees of the court, is, if anything can be, a judicial proceeding against the State itself. If not, it may well be asked, what would constitute such a proceeding?

"In the present cases the decrees were not only against the defendants in their official capacity, but, that there might be no mistake as to the nature and extent of the duty to be performed, also against their successors in office."

The learned Justice then clearly outlines the principles which distinguish the case under discussion from the *Osborn* and similar cases.

In *In re Ayers*, 123 U. S. 443-487, Mr. Justice Mathews again explains and differentiates the doctrine, for which defendant in error contends, from that of the *Osborn* case, in very clear and concise language.

In the late case of *Reagan* vs. *Farmers' Loan & Trust Co.*, 154 U. S. 362-389, Mr. Justice Brewer, in speaking of the principle herein contended for by defendant in error, clearly states the line of demarcation between this principle and that contended for by plaintiff in error. He says, at page 389:

"In the application of this latter principle, two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented.

"The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, and thus making it, though not a party to the record, the real party against which the judgments will so operate as to compel it to specifically perform its contracts. (*In re Ayers*, 123 U. S. 443; *Louisiana* vs. *Jumel*, 107 U. S. 711; *Antoni* vs. *Greenhow*, 107 U. S. 769; *Cunningham* vs. *Macon & Brunswick Railroad*, 109 U. S. 446; *Hagood* vs. *Southern*, 117 U. S. 52.)

"The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the State. (*Osborn* vs. *Bank of the United States*, 9 Wheat. 738; *Davis* vs. *Gray*, 16 Wall. 203; *Tomlinson* vs. *Branch*, 15 Wall. 460; *Litchfield* vs. *Webster County*, 101 U. S. 773; *Allen* vs. *Baltimore & Ohio Railroad*, 114 U. S. 311; *Board of Liquidation* vs. *McComb*, 92 U. S. 531; *Poindexter* vs. *Greenhow*, 114 U. S. 270.)"

As was said by Mr. Justice Bradley in *Cararnia* vs. *Temple*, 134 U. S. 30, in speaking of this question: "We do not think it necessary to consider that question anew."

Thus, it will be seen that there can be no question that the plaintiff in error is, in fact, attempting to sue the State of California. Can this be done?

SECOND POINT.

The Eleventh Amendment.

The Eleventh Amendment to the Constitution of the United States, ratified January 8, 1798, reads as follows.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Prior to this amendment, it had been held, in the case of *Chisholm* vs. *Georgia*, 2 Dall. 419, that a State was liable to suit at the instance of a citizen of the State. As soon as this decision was announced, steps were taken to obtain an amendment to the Constitution withdrawing jurisdiction. This resulted in the proposal of the Eleventh Amendment above quoted, which was subsequently ratified by the requisite number of States.

New Hampshire vs. *Louisiana*, 108 U. S. 76.

And it was accordingly held that, unless a State consents, the amendment prohibits the courts of the United States from entertaining a cause in which one State seeks relief against another State on behalf of its citizens, in a matter in which the State prosecuting has no interest of its own.

So it has been uniformly held that, where an officer of a State has been sued in his representative capacity to enforce an obligation alleged to be due from the State, the courts of the United States, under the Eleventh Amendment, have no jurisdiction to hear or determine the cause, without the consent of the State.

Louisiana vs. *Jumel*, *supra;*
Hagood vs. *Southern*, *supra;*
In re Ayers, *supra;*
Louisiana vs. *Steele*, *supra;*
Reagan vs. *Farmers' Loan & Trust Co.*, *supra;*
Belknap vs. *Schield*, *supra.*

We quote from the opinion of Mr. Justice Brewer, in *Reagan* vs. *Farmers' Loan & Trust Co.*, 154 U. S. 388 (1893), as showing that this question is now settled beyond peradventure:

"We are met at the threshold with an objection that this is in effect a suit against the State of Texas, brought by a citizen of another State, and, therefore, under the Eleventh Amendment to the Constitution, beyond the jurisdiction of the Federal court. The question as to when an action against officers of a State is to be treated as an action against the State has been of late several times carefully considered by this court, especially in the cases of *In re Ayers*, 123 U. S. 443, by Mr. Justice Mathews, and *Pennoyer* vs. *McConnaughy*, 140 U. S. 1, by Mr. Justice Lamar. In the former of these cases it was said (p. 505):

"'To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, never-

theless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates.'

"And in the latter (p. 9):

"'It is well settled that no action can be maintained in any Federal court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision which provides that "no State shall pass any law impairing the obligation of contracts." This immunity of a State from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a State, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the State itself.'"

The cases cited by plaintiff in error on pages 9 and 10 of his brief only support the right of Federal corporations, as a general proposition, to bring actions in the Federal courts, or to have actions instituted against them in the State courts removed to the Federal courts. This is not the question presented to this court at this time. The question before the court is, *not* whether it has jurisdiction to hear and determine an action instituted by plaintiffs, as Receivers of the Atlantic & Pacific Railroad Company, a corporation chartered under the laws of the United States, against defendants, to whom there is no jurisdictional objection: *not* whether this court has jurisdiction over the plaintiffs; but whether or not it has any jurisdiction *over the defendant* in an action of this character. In other words, where the State, although not a party to the record, is, as a matter of fact, the real and only party in interest against whom the judgment asked, if obtained, would operate, and where the nominal defendant has no personal interest in the subject-matter of the action, but defends only as representing the State, is such an action within the prohibition of the Eleventh Amendment to the Constitution of the United States?

As clearly shown by the authorities hereinabove cited, such an action is within the inhibitions contained in the Eleventh Amendment.

Counsel for plaintiff in error assert, under Points I. and II., pages 9 to 14 of his brief, that under Section 2, Article III., of the Constitution of the United States, and an Act of Congress dated August 13, 1888 (25 U. S. Statutes, 433), that the Atlantic & Pacific Railroad Company, being a corporation created by the Act of Congress, has the right to assert any cause of action where the amount involved exceeds two thousand dollars, in any Circuit Court of the United States, against any party, regardless of citizenship of the parties to such action, and that under this principle a State may be made a defendant. All of the cases cited are cases wherein parties are sued in their private capacity. The doctrine contended for by plaintiff in error may be, and doubtless is, good law when applied to private parties; but it does not apply when a sovereign State is a party. All of the reasons which apply against the suing of a sovereign State, and on account of which the Eleventh Amendment was adopted, apply equally as well, on principle, to the procedure outlined by plaintiff in error. The application of this doctrine would merely be attaining by indirection that which this court has uniformly held could not be done directly. It would simply amount to permission to sue the State of California, without its consent. The doctrine has been frowned upon by this

court in the case of *Hans* vs. *Louisiana*, 134 U. S. 1, where this precise question was raised. Article III., Section 2, of the Constitution, and the Act of Congress regulating the practice in the Circuit Court, cited by plaintiff in error, were noticed and commented upon. We do not deem it necessary to quote from this case at length. The court squarely held, after an extensive review of the authorities, that a State cannot, without its consent, be sued in a Circuit Court of the United States, *even though the case is one which arises under the Constitution and laws of the United States.*

See also—

North Carolina vs. *Temple*, 134 U. S. 22-30.

In *United States* vs. *Texas*, 143 U. S. 644, the court say:

"It is admitted that these words do not refer to suits brought against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States, even where such suits arise under the Constitution, laws, and treaties of the United States, because the judicial power of the United States does not extend to suits of *individuals* against States. (*Hans* vs. *Louisiana*, 134 U. S. 1, and authorities cited; *North Carolina* vs. *Temple*, 134 U. S. 22-30.)"

THIRD POINT.

Has the State of California Consented to be Sued?

In the case of *Beers* vs. *Arkansas*, 20 How. 527, 529, Mr. Chief Justice Taney said:

"It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission. But it may, if it think proper, waive this principle and permit itself to be made a defendant in a suit by individuals or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows *that it may prescribe the terms and conditions on which* it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."

See also—

Hans vs. *Louisiana*, *supra*;
Ball vs. *Holsell*, 161 U. S. 83.

The provision of the statute of California, which waives this privilege of immunity from suit at the instance of a private party in the case under consideration, is to be found in Section 3669, Political Code, *supra*, and it is in this Section that plaintiff in error must find his authority to prosecute the suit.

In accordance with the principles announced, *supra*, what were the terms prescribed, and what were the conditions imposed upon which this consent to be sued was given? In what manner should the suit be conducted?

Complete answers are to be found in the portions of Section 3669, Political Code, *supra*, which we have italicized. They are:

First—The Treasurer may demand that the action be tried in the Superior Court of the County of Sacramento.

Second—The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials, and appeals are applicable to the proceedings therein provided.

The State has the unquestioned right to select the forum in which it shall be sued, to prescribe the manner in which the suit shall be conducted, and to impose upon the prosecution of the action any condition that may be deemed proper. It may even retract its permission to be sued after an action has been commenced.

Railroad Co. vs. *Alabama*, 101 U. S. 32;
In re Ayers, 123 U. S. 505;
Hans vs. *Louisiana*, 134 U. S. 18;
Ball vs. *Holsell*, 161 U. S. 83.

Has the State consented to be sued in the Federal courts?

An examination of the provisions of Section 3669 shows that conditions are imposed which are wholly incompatible with a consent to be sued in the United States courts. A cause commenced in the Federal courts, sitting in California, could not be transferred from these courts to the Superior Courts of the State of California, in and for Sacramento County, if the Federal court had jurisdiction. Nor could the Federal courts conform to the provisions of the Code of Civil Procedure of the State of California relating to "pleadings, proofs, trials, and appeals." These provisions could have no application in a proceeding in the United States court.

Van Stone vs. *Stillwell*, 142 U. S. 133;
Fishburn vs. *Chicago etc. Co.*, 137 U. S. 60;
Mo. Pac. Ry. Co. vs. *Chicago etc. Co.*, 132 U. S. 191;
Hudson vs. *Parker*, 156 U. S. 281;
Delano vs. *Platte Co.*, 155 U. S. 221;
Chateaugay, Petitioner, 128 U. S. 545.

As said by Mr. Justice Gilbert, in rendering the opinion of the Circuit Court of Appeals in this cause:

"By this provision in regard to appeals, it was clearly the intention of the Legislature to make the Supreme Court of the State of California the court of last resort to pass upon all questions which might arise in such an action. It was intended that the rights of litigants in such a suit should be subject to the construction which that court should finally adopt. That provision secures to the State the most substantial right which is conserved to it in the section just quoted, and presents an insurmountable obstacle to the prosecution of the action in a court of the United States."

On pages 12 and 13 of his brief, counsel for plaintiff in error cites a large number of cases to the point that, inasmuch as Section 3669 of the Political Code authorized the institution of suits of this character in the State courts, the Federal courts cannot be deprived of jurisdiction to try such cases, by providing that they shall be tried only in the State courts. Plaintiff also cites the provisions of the Act of Congress giving the Federal courts jurisdiction "concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity."

Aside from the fact that this contention is disposed of by the case of *Hans* vs. *Louisiana*, *supra*, it is apparent that the vice of the position of plaintiff in error

is, that the Federal courts have no jurisdiction in actions brought against the State—that is expressly taken from them by the Eleventh Amendment. Therefore, Section 3669 of the Political Code does not deprive such courts of any jurisdiction whatever. The only effect of Section 3669, Political Code, was to confer upon certain persons a privilege which, without express authorization, they could not exercise in any form, viz: the privilege of suing the State. In conferring this privilege, the State had the right to prescribe the terms upon which it was to be exercised. It did so. One of those terms is that such suits *must be brought in the courts of the State.*

FOURTH POINT.

Assessment of the Rolling Stock.

From the statement of facts, it appears that plaintiff in error was the owner of the rolling stock assessed, and that said rolling stock ran over a railroad operated in more than one county of the State.

First—There can be no question but that the rolling stock of plaintiff in error may be taxed by the State of California.

American Refrigerator Co. vs. *Hall*, 174 U. S. 70;
Pullman's Car Co. vs. *Pennsylvania*, 141 U. S. 23;
Gloucester Ferry Co. vs. *Pennsylvania*, 114 U. S. 206;
Marye vs. *Baltimore & O. R. R. Co.*, 127 U. S. 117;
Frickeen vs. *Shelby Co.*, 145 U. S. 22.

Second—The scheme which the State has adopted for the taxation of this rolling stock is to be found in the following constitutional and statutory provisions:

Section 1, Article XIII., Constitution of California, reads as follows:

"All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. * * * "

Section 10, Article XIII., of the same Constitution, reads as follows:

"All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State, shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

Section 3628, Political Code, as it stood in 1891, so far as applicable, reads as follows:

"The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State, shall be assessed by the State Board of Equalization, as hereinafter provided for. * * * "

Section 3664, Political Code (Statutes 1883, page 65), so far as applicable, reads as follows:

"The president, secretary, or managing agent, or such other officer as the State Board of Equalization may designate, of any corporation, * * * owning *or operating* any railroad in more than one county in this State, shall, on or before the first Monday in April of each year, furnish the said board a statement signed and sworn to by one of such officers * * * showing in detail for the year ending on the first Monday in March in each year,

1. The whole number of miles of railway in the State * * * owned *or operated* by such corporation, person, or association.

2. * * *

3. * * *

4. The number of each kind of all rolling stock used by such corporation * * in operating the entire railway, including the part without the State.

5. Number, kind, and value of rolling stock owned and operated in the State.

6. Number, kind, and value of rolling stock used in the State, but owned by the party making the returns."

Section 3665, Political Code (Statutes 1891, page 438):

"The State Board of Equalization must meet at the State Capitol on the third Monday in July. * * * At such meeting the board must assess the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county. * * * *Assessments must be made to the corporation* * * * *owning the same.* The depots, stations, shops, and buildings erected upon the space covered by the right of way and all other property owned by such person, corporation, * * * are assessed by the Assessor of the county wherein they are situate. * * * "

From the foregoing, it is apparent that the State has provided for two things:

1. Every kind of property in the State shall be taxed in proportion to its value, to be provided by law.

2. It has provided by law that the State Board of Equalization shall assess the rolling stock of all railroads operated in more than one county at their actual value and apportioned to the counties through which the railroad is operated.

The reason for this is that railroad rolling stock operated in more than one county should pay proportional tribute to each county through which such rolling stock runs, which result can only be accomplished by the assessment and apportionment of such rolling stock by some central body or board, whose jurisdiction is co-extensive with the entire State.

Mr. Justice McKinstry, in *S. F. & N. P. R. R. Co.* vs. *State Board*, 60 Cal. 12, makes it very clear that the State Board of Equalization is to make the assessment. He says, at page 29:

"We are at a loss to imagine how any statute could make the duty of the State Board any clearer than does this distinct and positive mandate of the Constitution. If any doubt could possibly be built upon the words cited, it would be dispelled by the first clause of the same section: 'All property, *except as hereinafter in this section provided*, shall be assessed *in* the county, city, city and county, town, township, or district in which it is situated, *in the manner prescribed by law.*' Thus, by the very language of the Constitution all other but the railroad property mentioned must be assessed by the local assessors, in the manner prescribed by statute; the railroad property must be assessed in the manner prescribed by the sections of the Constitution. (8 Pac. L. J. 103.) That is, by the State Board without the aid of statute."

Here, then, we find the precise fact contemplated by the Constitution, viz: plaintiff in error operating a railroad in more than one county and running rolling stock owned by it over the railroad so operated.

Plaintiff in error thus states the fact, on page 6 of his brief:

"During all the time that the Atlantic & Pacific Railroad Company operated this leased line, it used some portion of its own rolling stock upon it. The rolling stock was never permanently in it (the State) and consisted of cars and locomotives, etc., running in and out of the State constantly and never permanently stopping in the State."

Third—The quotation by counsel for plaintiff from the decision of the Supreme Court of this State in *People* vs. *C. P. R. R. Co.*, 105 Cal. 576, must be read in the light of the question before that court for determination, and the facts of that particular case.

There the Central Pacific Railroad Company was the owner of an entire railway, and of all of its appurtenances. That railway was operated in more than one county in this State, and the Board of Equalization, in accordance with law, assessed to that company the "franchise, roadway, roadbed, rails, and rolling stock" owned by it. The assessment was made upon a lump sum valuation of all the property. Therefore, *under such circumstances*, the items so assessed constituted "an entirety incapable of division," so that if, as was contended in that case, the Federal franchise of the company had been included in the assessment, and that portion of the assessment for that reason had been void, the whole assessment being incapable, *under the circumstances*, of segregation or division, would have fallen, *i. e.*, the record in the case showed that the State Board of Equalization had, as a fact, assessed the franchise, railway, roadbed, rails, and rolling stock as an entirety. The appellant claimed that this assessment included a Federal franchise, which could not be taxed, but the court held that it must be presumed that the assessment was upon property within the jurisdiction of the board, and they could not, under the record, segregate the various items which made up the assessment as disclosed by the record, and cut out any portion of the assessment. That, however, is not the case here. The Atlantic & Pacific Railroad Company owned rolling stock operated over a line of railroad within this State; but it did not own the franchise, the roadway, the roadbed, nor the rails. The property of each corporation operating over this line of road was assessed to its respective owners: to the Atlantic & Pacific all that it owned, (certain rolling stock); to the Southern Pacific, its rolling stock, and the franchise, roadway, roadbed, and rails. The assessment, in each instance, was properly made.

It was not intended by Section 10, Article XIII., of the Constitution, nor by Section 3665 of the Political Code, that the assessment by the State Board of Equalization of the franchise, etc., of a railway company should be an indivisible entirety *in law*, unless it was so *in fact*. It was certainly never intended that where a company owned one only of the assessable items enumerated, (as in the present instance), the fact that it did not own the others should relieve it from taxation upon the one which it did own. Such a contention is without any reason on the face of it, and is in direct contradiction of Section 1, Article XIII., of the

California Constitution, which provides that *all* property (not exempt under the laws of the United States) shall be taxed. The rolling stock of the Atlantic & Pacific Railroad Company is *not* an indivisible part of the railroad of the Southern Pacific Railroad Company. It stands alone, separate and apart from any and all other property, is easily ascertainable and assessable, without regard to the property of the Southern Pacific Railroad Company, and was properly and legally so assessed.

To urge that the Constitution and Sections of the Political Code, prescribing the duties of the Board of Equalization in this behalf, indicated an intention to confine the assessments made by the board to *railroads* as an entirety only, and that, therefore, no procedure is prescribed for the assessment of rolling stock when owned apart from the railroad corporation owning the franchise, roadbed, roadway over which it operated, etc., is the extreme of technicality.

The franchise, roadway, roadbed, rails, and rolling stock of a railroad are not an entirety. While its franchise may not be sold without statute authority, and there is no statute authority in this State in this particular class of cases—(*Gregory* vs. *Blanchard*, 98 Cal. 311), yet its rolling stock may be attached and sold under execution.

Humphreys vs. *Hopkins*, 81 Cal. 551;
Dinsmore vs. *Racine Co.*, 12 Wis. 725-33;
Baston vs. *Gilmore*, 37 N. H. 410; 72 A. D. 336;
Col. vs. *Columbus Co.*, 10 Ohio St. 372; 75 A. D. 518;
Arthur vs. *Com. Ry. Co.*, 9 Swedes & M. 394; 48 A. D. 719,
Freeman on Exec., Sec. 126a.

If an entirety, why the enumeration in Section 3664, Political Code, *supra*.

Fourth—Counsel for plaintiff in error say, on page 21 of brief:

"It is the rolling stock of a railroad, and not the rolling stock used on any railroad operated in more than one county in the State, that is to be assessed by the State Board of Equalization."

Counsel's error consists in attempting to convert the descriptive phrase "of a railroad" into a statement of ownership. A railroad "owns" nothing, but is, itself, "owned." Nor is there any statutory direction that rolling stock "of a railroad" should be assessed to a *railroad*. On the contrary, the specific direction of the statute (Sec. 3665 Political Code—Statutes 1891, page 438) is that such rolling stock shall be assessed *to the corporation, person, or association, owning the same.*

RECAPITULATION.

1. A suit against an officer in his representable capacity, as disclosed by the record herein, is a suit against the State of California.

2. Under the Eleventh Amendment to the Constitution of the United States, a sovereign State cannot be sued without its consent.

3. The State of California has not consented to be sued in the courts of the United States by a private individual.

4. The State Board of Equalization had jurisdiction to, and in fact was the only body that could, assess the rolling stock of a railroad operated in more than one county of the State.

Respectfully submitted.

TIREY L. FORD, Attorney-General of California,
GEORGE A. STURTEVANT, Deputy Attorney-General, and
WILLIAM M. ABBOTT, Deputy Attorney-General,
Attorneys for Defendant in Error.

AFFIDAVIT OF SERVICE BY MAIL.

C. W. Smith etc
Plaintiff in Error
vs. No. 922
Truman Reeves, etc
Defendant in Error

STATE OF CALIFORNIA,
City and County of San Francisco } ss.

George Francis (Name of affiant.) being duly sworn, deposes and says: That he is a citizen of the United States, over the age of eighteen years, and is not a party to this action, and that he resides at San Francisco (City or town.), County of San Francisco, State of California; that C. N. Sterry (Name of opposing counsel.) is the attorney of record of the above-named Plaintiff (Appellant or Respondent.) in said cause, and that he resides at Los Angeles (City or town.), in the County of Los Angeles, State of California; and that in each of said two places there is a United States Post Office, and between said two places there is a regular daily (Daily, weekly, etc.) communication by mail; that on the 10th day of March, 1900, deponent served a true copy of Brief of Defendant in Error (Name of instrument.) herein, of which this is the original, on said C. N. Sterry (Name of opposing counsel.), attorney for Plaintiff (Appellant or Respondent.) by depositing such copy aforesaid on this date, in the Post Office at San Francisco (City or town.), aforesaid, properly inclosed in an envelope, addressed to said C N Sterry (Name of opposing counsel.), at Los Angeles (City or town.) his place of business (Business or residence.), and prepaying the postage thereon. And deponent further sayeth not. George Francis

Subscribed and sworn to before me, this 10th day of March, 1900.

Chas. P. Gale
Clerk to Attorney General of California